Canadian Forces Grievance Board | Comité des griefs des Forces canadiennes

THE ROAD FORWARD

CANADIAN FORCES GRIEVANCE BOARD • 2009 ANNUAL REPORT

Canada

Canadian Forces Grievance Board 2010
Cat. No. DG1-2009
ISBN 978-1-100-51039-2

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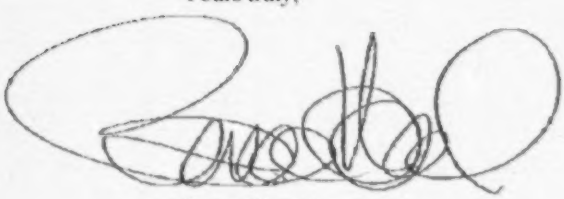
March 31, 2010

The Honourable Peter MacKay
Minister of National Defence
National Defence Headquarters
MGen Georges R. Pearkes Building
101 Colonel By Drive
Ottawa, Ontario
K1A 0K2

Dear Minister,

Pursuant to section 29.28(1) of the *National Defence Act*, I hereby submit the 2009 annual report on the activities of the Canadian Forces Grievance Board for tabling in Parliament.

Yours truly,



Bruno Hamel
Chairperson

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Message from the CHAIRPERSON & CEO

I am pleased to submit the Canadian Forces Grievance Board 2009 Annual Report, my first as Chairperson.

In 2010, the Board will be celebrating its tenth anniversary. This important milestone has given us an opportunity over the last twelve months to both reflect on our first decade of achievements and to start setting the stage for the future; "*The Road Forward*" is a fitting title for this report.

After almost ten years in operation, the Board has developed a unique expertise in the review of military grievances and gained recognition for its valuable contribution to complaint resolution within the Canadian Forces. This strong foundation has allowed us to look to the future with confidence and to challenge ourselves and engage our partners to find new ways to improve the Canadian Forces grievance process.

Over the last twelve months, we have restructured the Board and refined and adjusted our processes to ensure a more integrated and efficient internal review process is in place. These adjustments have allowed us to achieve the impressive productivity results presented in this report. At the same time, and after discussions with the Canadian Forces, we began evaluating a new model for the referral of grievances which we believe will further enhance the fairness and transparency of the military grievance system.

A few months ago, the Board launched another important initiative and began publishing the systemic recommendations we make to the Chief of the Defence Staff. While reviewing individual grievances, the Board sometimes finds that a problem with the content or the application of a policy or a regulation might affect more than one member. The Board then makes a "systemic recommendation" to the Chief of the Defence Staff to alert him to the broader issue.

Over the years, the Board has made it a priority to share with stakeholders the knowledge it accumulates from its review of grievances so that they can benefit from an increased awareness and understanding of issues affecting Canadian Forces members. Publishing the "systemic recommendations" is another step in this direction and part of the Board's continuing effort to contribute to the effectiveness of the military grievance process and the well-being and morale of Canadian Forces members.

Simultaneously, our corporate initiatives have focused on providing the appropriate support to the organization, while ensuring our activities were consistent with the government's priorities and the Public Service values and management excellence.

As our dedicated employees and Board members complete another year of hard work, I am confident that we have the right skills and the resolve to guide our organization towards the two components of our vision: *to be a model administrative tribunal that functions with professionalism, good governance and fair processes, and to be the centre of expertise in military grievances.*

Bruno Hamel
Chairperson

The Canadian Forces Grievance Board

MANDATE

The Canadian Forces Grievance Board is an independent administrative tribunal reporting to Parliament through the Minister of National Defence.

The Canadian Forces Grievance Board reviews military grievances referred to it pursuant to section 29 of the *National Defence Act* and provides findings and recommendations to the Chief of the Defence Staff and the member who submitted the grievance.

THE GRIEVANCE CONTEXT

Section 29 of the *National Defence Act* (NDA) provides a statutory right for an officer or a non-commissioned member who has been aggrieved, to grieve a decision, an act or an omission in the administration of the affairs of the Canadian Forces (CF). The importance of this broad right cannot be overstated since it is, with certain narrow exceptions, the only formal complaint process available to CF members.

Since its creation in 2000, the Canadian Forces Grievance Board (CFGB) has acted as the external and independent component of the CF grievance system.

The Board reviews all military grievances referred to it by the Chief of the Defence Staff (CDS), as stipulated in the NDA and article 7.12 of the *Queen's Regulations and Orders for the Canadian Forces*. Following its review, the Board submits its findings and recommendations (F&R) to the CDS, at the same time forwarding a copy to the grievor; the CDS is the final decision-maker. The CDS is not bound by the Board's report, but must provide reasons, in writing, in any case where the Board's F&R are not accepted.

The Board also has the obligation to deal with all matters as informally and expeditiously as the circumstances and the considerations of fairness permit.

The types of grievances that must be referred to the Board are those involving administrative actions resulting in deductions from pay and allowances, reversion to a lower rank or release from the CF; application or interpretation of certain CF policies, including those relating to conflict of interest, harassment or racist conduct; pay, allowances and other financial benefits; and entitlement to medical care or dental treatment.

The CDS must also refer to the Board grievances concerning a decision or an act of the CDS in respect of a particular officer or non-commissioned member. The CDS also has discretion to refer any other grievance to the Board.

The Canadian Forces grievance process consists of two levels: the Initial Authority and the Final Authority. Certain categories of grievances must be referred to the Canadian Forces Grievance Board. The Chief of the Defence Staff has the discretion to forward any other grievance for review by the Board.

BOARD STRUCTURE

The Board consists of Governor in Council (GIC) appointees who, alone or in panel, are responsible for reviewing grievances and issuing F&R.

Under the NDA, the GIC must appoint a full-time Chair, at least one full-time Vice-Chair, and one part-time Vice-Chair. In addition, the GIC may appoint any other full or part-time members the Board may require to carry out its functions. Appointments may be for up to four years and may be renewed.

CFGB employees provide support to Board members. Grievance officers and legal counsel work directly with Board members to provide analyses and legal opinions on a wide range of issues. The responsibilities of the Board's corporate services include strategic planning, performance evaluation and reporting, human resources, finance, information management and information technology, and communications.

THE GRIEVANCE PROCESS

The CF grievance process consists of two levels and begins with the grievor's Commanding Officer (CO).

Level I: Review by the Initial Authority (IA)

- **Step 1**: The grievor submits a grievance in writing to his or her CO.
- **Step 2**: The CO acts as the IA if the CO can grant the redress sought. If not, the CO forwards the grievance to the senior officer responsible for dealing with the matter. Should the grievance relate to a personal action of an officer who would otherwise be the IA, the grievance is forwarded directly to the next superior officer who is able to act as IA.
- **Step 3**: The IA renders a decision, and if the grievor is satisfied, the grievance process ends.

Level II: Review by the Final Authority (FA)

Grievors who are dissatisfied with the IA's decision may ask to have their grievance reviewed by the FA, which is the CDS or his/her delegate.

- **Step 1**: The grievor submits his or her grievance to the CDS for FA level consideration and determination.
- **Step 2**: Depending on the specific details of the grievance, the CDS may be obligated, or may, in his or her discretion, refer it to the Board. If the grievance is referred for consideration, the Board conducts a review and provides its F&R to the CDS and the grievor. Ultimately, the FA makes the final decision on the grievance.

The Canadian Forces Grievance Board provides an independent and external review of military grievances. In doing so, the Board strengthens confidence in, and adds to the fairness of, the Canadian Forces grievance process.

The Year in Review

FOR THE PAST DECADE...

...the Canadian Forces and its personnel have benefited from the Canadian Forces Grievance Board's external review of military grievances. The Board remains committed to maximizing its contribution to the military grievance process and, thereby, the well-being and morale of Canadian Forces members.

REPOSITIONING FOR THE FUTURE

After almost ten years in operation, the Board has developed a unique expertise in the review of military grievances and gained recognition for its contribution to the fairness and transparency of complaint resolution within the CF. Building on this strong foundation, the Board moved forward in 2009 to reposition the organization to meet changes and new challenges, as it remained committed to maximizing its contribution to the military grievance process and the well-being and morale of CF members. Both operational and management initiatives in the last year focused on using the Board's maturity and experience to prepare for the future. In doing so, the CFGB took the time to reflect on the challenges and achievements of the last decade and used them as valuable lessons to refine its processes and improve its efficiency.

Robust and Timely Processes

The Board's continuous efforts over the years to adjust and refine its processes yielded impressive results as the timeline to complete the review of a grievance by the Board dropped to an average of 4.9 months for cases received and completed in 2009. This is a major improvement compared to both the CFGB's productivity standard of six-month and timelines for previous years (8.7 months in 2008 and 9.5 months in 2007). These results are detailed later in this report in the Operational Statistics section.

With optimal performance in mind, the Board restructured its operations by merging its grievance analysis and legal counsel directorates. Furthermore, the Board moved towards a more integrated internal review process, with the assigned Board member, team leader, grievance officer and legal counsel participating in a case conference in the initial stages of review. The changes resulted in significant savings in time and in improved quality control of the Board's F&R.

In 2009, as in previous years, the Board has worked hard to ensure grievances are reviewed in a timely manner.

What happens when the Board receives a grievance file?

The Board's current grievance review process consists of three steps: grievance reception, grievance review, and the preparation and submission of findings and recommendations (F&R).

Grievance Reception:

Upon receipt of a grievance, the Board sends a letter of acknowledgement to the grievor disclosing the information contained in the file and inviting the grievor to submit additional comments or other documents relevant to his/her case.

Grievance Review:

An assigned Board member, assisted by a team leader, a grievance officer and legal counsel, reviews the grievance and identifies the issues. If necessary, additional documentation is obtained and added to the file and subsequently disclosed to the grievor.

Findings and Recommendations:

The Board member issues instructions, which the grievance officer uses to prepare the final F&R for the Board member's approval. The F&R are then sent simultaneously to both the Chief of the Defence Staff (CDS) and the grievor.

At this point, the Board no longer retains jurisdiction over the case, although the Board tracks its ultimate outcome. The grievor receives a decision directly from the Final Authority (FA) in the grievance process, the CDS or his/her delegate.

The FA is not bound by the Board's F&R. However, in cases where the FA disagrees, reasons must be provided in writing to both the Board and the grievor.

A New Model for Grievance Referrals

In 2009, the CFGB, in coordination with the CF, began evaluating a new model for the referral of grievances, which the Board believes will add to the fairness and transparency of the military grievance process. Current regulations stipulate that only certain categories of grievances are referred to the Board for review. Therefore, not every grievor whose grievance has reached the FA level benefits from the Board's external review of his or her complaint.

Under this new *'principled approach'* to grievance referrals, the Board would review all grievances where the CF is unable to resolve the matter to the satisfaction of the grievor. In those cases, the CDS and the CF member would benefit from the Board's independent review before a final decision is rendered. The CDS supported the *'principled approach'* initiative in his *2008 Annual Report on the Canadian Forces Grievance System*. Amendments to the NDA and regulations may be required to fully implement this initiative.

Systemic Recommendations

In reviewing individual grievances, the Board sometimes finds an issue with the content or the application of a policy or a regulation that affects more than one member. In these cases, the Board prepares a systemic recommendation, which is clearly stated and highlighted in the F&R, to advise the CDS that a broader problem may exist. To promote an awareness of these issues, in 2009, the Board began publishing these systemic recommendations on its website. The Board intends to track each systemic recommendation until the CDS makes a decision. Furthermore, whenever a decision is made to act on a systemic recommendation, the Board will monitor progress until implementation.

"We wish to commend [Board member] for the excellent and well-balanced analysis of the situation faced by our client and for the reasoned findings and recommendations he has made. Though the result is not fully in the favour of the client, we believe it is an acceptable conclusion to our client's grievance and we are pleased to acknowledge the professional manner with which our client's grievance was reviewed by your Board."

Colonel (retired) Michel W. Drapeau, Legal Counsel

Video-Conferencing Capability

To increase its efficiency and flexibility, the Board began the process of acquiring a video-conferencing capability. This new technology will lead to significant savings in travel expenses by considerably reducing the need for part-time Board members, who live in different areas of the country, to travel to and from Ottawa to participate in operational activities. More importantly, this new capability will allow easy and direct interaction between Board members and their assigned team during case conferences.

Video-conferencing can also be used at hearings to receive testimony from witnesses at remote locations.

Furthermore, the video-conferencing capability fits well within the Board's business continuity and resumption planning as it provides a management and communication alternative between Board members and staff should a crisis disrupt normal lines of communications and work routines.

With its excellent expansion capabilities and compatibility with other systems, this technology is expected to remain viable well into the future.

An Integrated Approach to Reach Out to Stakeholders

In the past year, the Board focused on sharing the knowledge it accumulates from its review of grievances, so that stakeholders can benefit from an increased awareness and understanding of issues affecting CF members. By reaching out, the Board also fosters the development of effective and open lines of communications between all parties involved in complaint resolution for the benefit of both decision-makers and grievors. Additionally, improved communications promote a more efficient process by ensuring that all stakeholders understand the CF grievance process.

To accomplish this, the Board increased and diversified its outreach activities and engaged all levels of stakeholders within the CF through publications, base visits, regular meetings, presentations in a variety of venues, as well as participation in relevant CF conferences and events. The Board placed particular emphasis on sharing with decision-makers the many valuable lessons learned from its review of more than 1,200 cases since 2000.

Publications:

Two Bulletins *inserted in the* Maple Leaf

Sharing information with CF members about cases reviewed by the Board can improve their understanding of the regulations, policies and guidelines affecting them. In order to reach out to CF members, the Board published two Bulletins inserted in the *Maple Leaf*, the weekly national newspaper of the Department of National Defence (DND) and the CF. In the first insert, published in February, the Board informed CF members about its role and outlined how its F&R can contribute to the fairness and the transparency of the military grievance system. The second insert, published in September, featured an article on various aspects of correctly submitting a grievance, as prescribed by regulation.

A new edition of Perspectives

The Board published a second edition of *Perspectives*, its newsletter directed primarily to senior CF officials at DND Headquarters. Through the review of individual grievances, the Board is able to identify general trends, conflicting or inadequate policies, areas of dissatisfaction and problems of a systemic nature. *Perspectives* was created in 2008 to share this valuable information with key decision-makers and professionals associated with conflict resolution in the CF.

New issues of the eBulletin

The quarterly *eBulletin* has proven to be a valuable communication tool. Available through the CFGB website, this electronic newsletter highlights current and interesting cases reviewed by the Board and describes the Board's F&R and the final CDS decision for each case. The *eBulletin* also provides updates on key grievance statistics and Board activities.

Website

All the Board's publications are available on its website. The Board's website is updated regularly and case summaries, systemic recommendations and other related information are posted as they become available.

www.cfgb-cgfc.gc.ca

Base visits:

By visiting military bases, the Board extends its outreach capacity to the field. Base visits provide CF members with an opportunity to directly exchange information about issues and concerns related to complaint resolution and to learn about the Board's work and procedures. They also allow Board members and grievance officers to better understand current conditions and challenges in the CF. More importantly, these visits sometimes give Board members insight, in advance, into policies and regulations which may be a source of dissatisfaction. For example, during a recent visit, a number of base personnel raised concerns about a more restrictive application of the CF relocation policy. Shortly after, the Board received a grievance related to this issue.

In 2009, Board members and senior management visited Maritime Forces Atlantic in Halifax where the delegation held briefing sessions with senior level managers to explain the CFGB's unique role in the resolution of military grievances. Later in the year, Board members, grievance officers and legal counsel visited 8 Wing Trenton where they made presentations, met mid-level managers and answered questions about the CF grievance process and the Board's role in the process.

Training and presentations:

The Board attended and made presentations at the Chief Warrant Officers and the Chief Petty Officers 1st Class Qualification Course, in April and September, and at the Director General Military Careers Symposium, in October.

Name Change

In 2009, the Board continued to pursue a change of name. The Board believes its current name does not reflect its unique and external role, as intended by Parliament, and often contributes to a common misconception that the Board is an internal organization within DND and the CF.

During base visits, training conferences, leadership courses and communication campaigns, both the CFGB and the Director General Canadian Forces Grievance Authority, the CF organization responsible for the management and support of the military grievance system, dedicate substantial efforts to clarify their respective roles and responsibilities within the CF grievance process. Notwithstanding these efforts, the confusion remains.

To eliminate this confusion and to clarify its role, the Board has suggested its name be changed to *Military Grievances External Review Committee*. During discussions with DND and the CF, stakeholders have expressed no major concerns about this proposal; however, this change would require an amendment to the NDA. The Board is hopeful that the name change will be included in the upcoming amendments to the NDA.

Review of the Mission, Vision and Values Statement

After ten years in operation, the Board decided it was time to review its Mission, Vision and Values statement to reflect the organization's current reality and aspirations. In drafting the new statement, the CFGB's objective was to identify the Board's unique role within the CF complaint resolution mechanisms and to emphasize its value-added. Another objective was to reinforce the Board principles and values ensuring that all CFGB employees govern themselves by these guiding statements.

Mission

To provide an independent and external review of military grievances to strengthen confidence in, and add to the fairness of, the Canadian Forces grievance process.

Vision

The Canadian Forces Grievance Board is the centre of expertise in military grievances and a model administrative tribunal, through its fair and efficient processes, professionalism, and good governance.

Values

Excellence: We strive to attain the highest standards through continuous improvement and leadership.

Integrity: We commit to fairness and transparency in processes, actions and decisions.

Respect: We commit to courtesy and professionalism in dealing with others.

Learning : We commit to an environment where creativity, innovation and personal development are fostered.

Accountability: We adhere to the Values and Ethics Code for the Public Service and accept responsibility for our actions.

Corporate Initiatives

Five-year evaluation of Board performance:

All departments are required to conduct a comprehensive review of their programs every five years. In compliance with this requirement, in 2009, the Board launched a new evaluation to assess its performance. This evaluation will provide the Board with valuable feedback which will help to position it for the future. The scope of the evaluation is restricted to CFGB services that directly benefit the CF and its members.

The evaluation will focus on the five key issues to be addressed in a program evaluation: continued need for the program; alignment with government priorities; alignment with federal roles and responsibilities; achievement of expected outcomes; and demonstration of efficiency and economy.

The evaluation will be completed in 2010 and will be posted on the Board's website.

Work Environment

Official Languages:

As stated in his *Sixteenth Annual Report to the Prime Minister on the Public Service of Canada*, one of the priorities of the Clerk of the Privy Council is the promotion of Canada's linguistic duality in the Public Service.

The 40th anniversary of the *Official Languages Act* in 2009 therefore provided an opportunity for the Board to reiterate its commitment to maintaining a workplace where employees can use their official language of choice, while supporting and encouraging those who develop skills in the second official language. Training was offered to employees and an Official Languages workshop was organized for all staff.

Employment Equity:

Another priority of the Clerk, stated in his *Public Service Renewal Action Plan*, is to close the gap in the representation, within the Public Service, of designated employment equity groups, particularly visible minorities. Acting on this priority, the Board developed and implemented new staffing strategies and, by December 31, 2009, succeeded in doubling the representation of visible minorities within its staff from 2.5 % in the previous year to 5.4%. The Board also increased its representation of the three other designated employment equity groups.

The CFGB continues to support the *Public Service Renewal Action Plan* and has included employment equity goals and objectives in all its corporate planning documents.

Security Protocols:

To ensure the highest possible security standards, the Board developed a Security Handbook, which guides employees in security responsibilities involved in daily activities. The Handbook provides guidelines on the classification of documents, security of assets, storage, transmittal and transportation of documentation, as well as other security-related subjects.

The Board has also completed many elements of a comprehensive review and update of its Business Continuity and Resumption Plan, to guide activities should a major crisis disrupt normal work routines.

Virtual Library

To ensure employees have valuable and sustainable working tools, the Board launched a knowledge management initiative to create an online *Virtual Library*. Board members, team leaders, grievance officers and legal counsel will be able to more quickly and easily find references and research tools online that can support them in their work.

Review of Logic Model and Strategic Outcomes

A logic model for the CFGB was first presented in the 2004 Results-Based Management and Accountability Framework. This model was revised in 2009 to better articulate the objectives of the CFGB as it has evolved. The logic model ensures alignment with the Board's Strategic Outcome as defined by its Program Activity Architecture, as well as the *Management, Resources & Results Structure* of the Treasury Board Secretariat. The new logic model will be a valuable tool for ongoing and future assessment of the Board's achievements.

OPERATIONAL STATISTICS

Operational performance is a priority for the Board. It represents its ongoing contribution to the fairness and efficiency of the military grievance process and ensures the high quality and the timeliness of its F&R. To maintain optimum productivity and the excellent quality of its services, the Board regularly assesses its internal review processes and closely monitors and evaluates its production timelines, workload and planning assumptions. This rigorous exercise allows the Board to remain agile by continuously aligning its capabilities to its workload.

"Your superior knowledge of policies pertinent to my case enabled you to point out numerous administration actions that contravened published directives. This resulted in a favourable outcome for me. I hope this won't happen to another Reservist in the future."

A member of the Reserve Force praising the Canadian Forces Grievance Board's work after he was granted redress.

"The Board has developed a unique expertise in the review of military grievances and gained recognition for its valuable contribution to complaint resolution within the Canadian Forces. This strong foundation allows us to challenge ourselves and engage our partners to find new ways to improve the Canadian Forces grievance system."

Bruno Hamel, Chairperson.

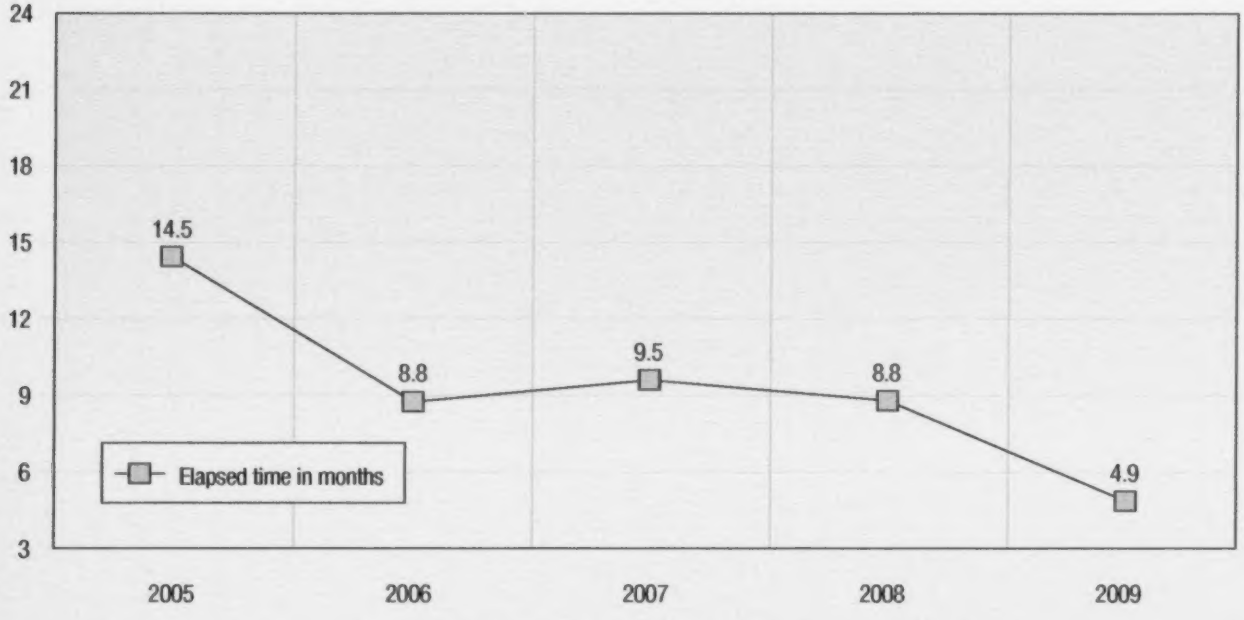
A Timely Review

The Board established an average productivity standard of six months to complete the review of a grievance. Refinements implemented in recent years have further streamlined processes and increased efficiency, bringing this average down to 4.9 months for cases received and completed in 2009.

This improved timeliness has also resulted in a decrease in the inventory of grievances at the Board, which significantly reduces the risk of future backlogs.

Figure I demonstrates the elapsed time taken on cases completed in the last five years.

FIGURE I

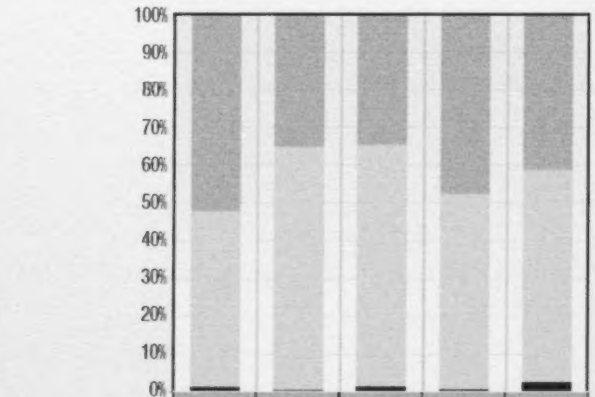


** Note: Since cases are received throughout the year, not all cases received in 2009 have been completed by December 31, 2009. These statistics will be adjusted in future reports to include the balance of 2009 cases.*

An Independent Review

As an administrative tribunal, the Board is always conscious of its fundamental obligation to review every case fairly and impartially. Neutrality is essential. Each file is carefully reviewed, the issues analyzed and the relevant evidence considered, along with the submissions of the grievor and CF authorities. Each case is reviewed on its own merits; however the Board maintains an extensive library of precedent CDS decisions and F&R to assist Board members and staff when considering a file. Grievances usually involve decisions made by CF authorities; the Board's general approach is to examine both the evidence and the process to ensure the decision is both reasonable and correct. In some situations there may be more than one option available to the reasonable decision-maker (a good example being release items); it is usually in this category of grievance where the CDS may sometimes disagree with the Board. Figure II below sets out the number of cases for the past five years where the Board has recommended denial or grant.

FIGURE II



	2005	2006	2007	2008	2009
Upheld – Partially Upheld	73	47	34	59	44
Denied	67	87	64	65	61
Cases without outcome	1	0	1	0	2

Since 2005, the Board issued F&R on 605 grievances of which 42.5% (257 cases) had recommendations to uphold or partially uphold the grievance. The CDS has so far rendered decisions on 210 of these 257 cases.

"The Board is key to the Canadian Forces complaint resolution system... The expectation of a fair treatment in respect of a complaint is an underlying part of morale and Esprit de Corps... Thank you for serving the men and women who serve in Canada and abroad."

The Chief of the Defence Staff, General Walter Natynczyk, during a visit to the Canadian Forces Grievance Board offices in September 2009.

Value to the Canadian Forces

In addition to strengthening the confidence in, and adding to the fairness of, the CF grievance process, the Board review provides value-added to senior leadership, decision-makers, CF members and grievors through clear and comprehensive analysis and explanation of every case referred to it, regardless of the recommendation the Board makes on the grievance.

In the last five years, as shown in Figure III, of the 210 cases where the Board recommended upholding or partially upholding the grievance and for which the CDS rendered decisions, the CDS agreed with the Board in 81% of the files. This result exemplifies the value of the Board's independent and expert review. In cases where the recommendation was to deny the grievance, the Board's F&R provided the grievor with a detailed explanation of the Board's conclusions and the basis upon which the review validated the CF's interpretation of the regulation, policy or order in question.

FIGURE III

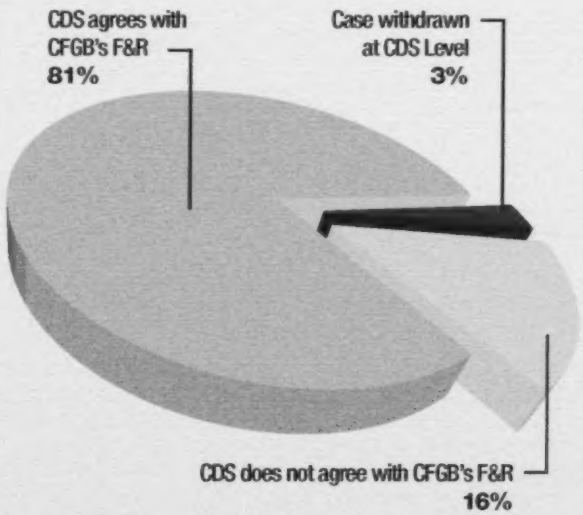


Table I

Grievance Categories	Upheld	Partially Upheld	Withdrawn due to CF Informal Resolution	Denied	No jurisdiction	Not Grievable	Total
Financial	14	7	1	24			**46**
General	5	5		14		1	**25**
Harassment-Discrimination	1	5		6			**12**
Release	5	1		17	1		**24**
Total	**25**	**18**	**1**	**61**	**1**	**1**	**107**

Completed Grievance Reviews

Table I outlines the distribution by recommended outcomes of the 107 cases completed by the Board in 2009.

Categories of Grievances Received

Figure IV shows the breakdown, by category, of the grievances received at the Board in the last three years (financial, general, harassment/discrimination and release). In 2009, grievances related to financial issues continued to be in the majority.

FIGURE IV

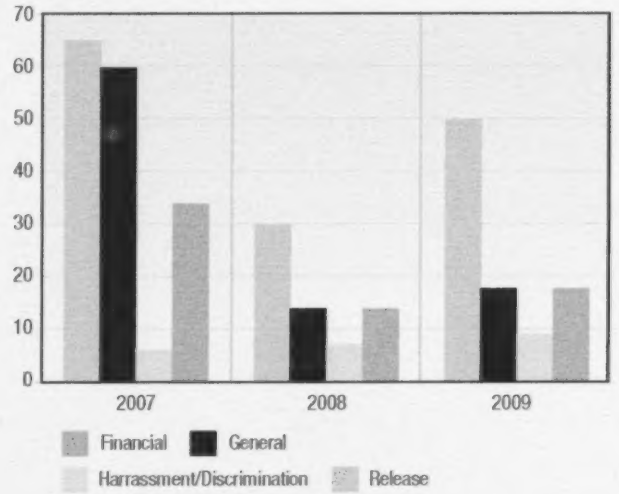
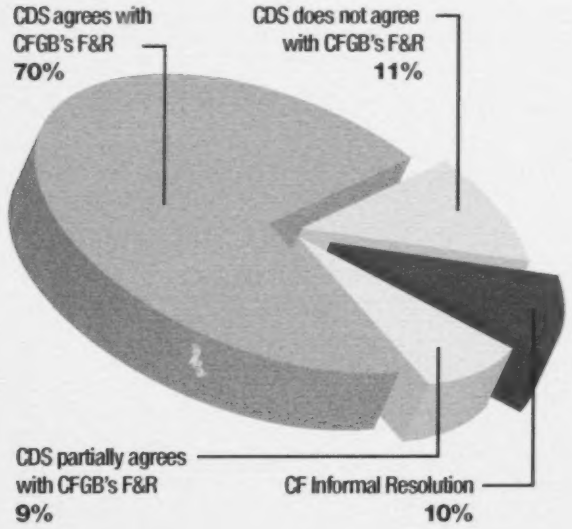


FIGURE V

82 received between January 1, 2009 and December 31, 2009



CDS Decisions Received in 2009

The Board received CDS decisions in response to 82 grievances. As shown in Figure V, the CDS agreed and partially agreed with 89% of the F&R of the Board, of which 10% were resolved informally after the Board F&R were issued to the CDS and the grievor.

Case Summaries

FINDINGS & RECOMMENDATIONS AND FINAL DECISIONS

- Compensation sought for discrimination
- Reversion in rank not in accordance with regulations
- Promotion deferred following assignment of Medical Employment Limitations
- Incentive Pay Category anniversary challenged
- Rank adjustment affects regulations and policy

COMPENSATION SOUGHT FOR DISCRIMINATION

Board Findings and Recommendations

A female grievor contended she was discriminated against on the basis of sex, specifically pregnancy. The grievor had been employed in a position on Class B Reserve Service. At the end of her two-year term, a selection process was held to fill the same position for another three-year term, to which the grievor applied. Of the two candidates interviewed, including the grievor, neither was offered the position.

At the time of her interview, the grievor was known to be two months pregnant. The unit Employment Board members asked her if she was deployable, to which the grievor argued the question was meant to bring out her medical status.

Initially, the grievor requested that she be given the position she was denied and that she receives maternity and parental leave benefits to which she would have been entitled. However, due to elapsed time which resulted in a change in circumstance, she amended her redress to seek financial compensation only.

In employment discrimination cases, the complainant must prove a prima facie case of discrimination, following which the burden shifts to the employer to provide a reasonable explanation for the conduct in question. The Board found the grievor had proven a prima facie case of discrimination. The Board found the CF had not provided a reasonable explanation for the apparent discrimination. Therefore, the Board found the grievor was discriminated against by the CF.

The Board also found it did not have to apply the test for justification of the discriminatory practice because the CF already has an accommodation policy for its pregnant members.

The Board found that the CF had an obligation to correctly administer the competition for class B employment, and that it failed in that duty. As a result, the grievor suffered financial loss in not obtaining the position.

The Board recommended that the CDS uphold the grievance and that he refer the file to the Director Human Rights and Diversity (DHRD) for restitution through an informal resolution.

INFORMAL RESOLUTION

The Board was informed that the grievor had withdrawn her grievance following an informal resolution offered by the DHRD.

REVERSION IN RANK NOT IN ACCORDANCE WITH REGULATIONS

Board Findings and Recommendations

The grievor, employed in Operations at an Air Wing, received a promotion and a posting to another Unit with a change of strength (COS) date. Following his promotion date but prior to his COS date, the grievor advised his supervisor that he had applied for a civilian position and that he might request his release. When the grievor subsequently requested his release, the gaining and losing unit Commanding Officers (CO) decided for operational reasons to leave the grievor in his former position until his pending release. The losing CO specifically requested direction from the grievor's Career Manager and said he would ensure the grievor reported for his new duties if the promotion was in jeopardy. However, direction was not received and the grievor was reverted in rank.

The grievor contended that he was unfairly reverted in rank for not fulfilling the service requirement to report for duty because he was ordered not to do so by his losing CO. He also contended that nowhere in his promotion or posting instructions nor in the applicable references did it state that his promotion could be in jeopardy if he did not actually report to his new unit.

As redress, the grievor requested his reversion in rank be cancelled.

Article 11.02 of *Queen's Regulations and Orders for the Canadian Forces* requires that conditions set by the CDS be met prior to promotion. There was no dispute that the grievor met the conditions for promotion prescribed by the CDS. The Board therefore found that the Director General Recruiting and Military Careers' direction to cancel the promotion unless the member physically reported for duty at the new place of duty was a new requirement for promotion, set by Director Military Careers (D Mil C), and that it could not be applied retroactively. Any new condition must be set by the CDS prior to promotion. The Board found that the grievor's promotion could not be cancelled retroactively for failing to meet such a condition.

Finally, the Board found that the reversion of the grievor's rank was not done according to regulations and was therefore invalid.

The Board recommended that the CDS uphold the grievance and reinstate the grievor to his promoted rank effective back to the date on which he received the promotion. The Board also recommended that the policies requiring CF members to physically report for duty as a condition of promotion and those guiding the cancellation/reversion of rank after substantive promotion be reviewed.

Chief of the Defence Staff Decision

The CDS agreed to uphold the grievance but disagreed with the Board's recommendation to review policies.

The CDS determined that the grievor could have reported for duty at the gaining unit but did not as a result of an agreement between the two CO. The CDS also concluded that, once a promotion is substantive, the promotion may only be reverted for disciplinary reasons or inefficiency. The CDS found that neither reason applied in this case. Therefore, the decision to cancel the grievor's promotion was not reasonable and was contrary to the policy in effect at the time.

The CDS did not support the Board's recommendation to review promotion policies, stating it was reasonable for the D Mil C to cancel a rank change instruction when a member requests to be released from the CF before a promotion has been made substantive. However, the CDS found that this did not apply to the grievor's situation because the promotion was already substantive prior to the request for release.

By allowing substantive promotions before members report to new posts, the CDS concluded that the CF accepts that some individuals may be promoted without reporting to their new duty location. Therefore, the CDS found that it was not the intent of the policy but its articulation that was lacking. The CDS referred this important question to the Chief of Military Personnel (CMP) for review.

The CDS similarly concluded that the internal Director General Military Careers memorandum requiring a member to physically report to the new place of duty for a promotion to be effective, restricted *Canadian Forces General Message* 073/06 and the conditions

for a rank reversion as established in *Canadian Forces Administrative Order* 49-4. The CDS stated that by agreeing to release the grievor, it was the CF who terminated the terms of service. Once this decision has been made, the CF cannot then penalize the member for exercising his right. The CDS therefore asked CMP to ensure that this internal memorandum is no longer used.

The CDS determined that the grievor's substantive promotion would be restored to its original date, and that his pay and seniority levels would be adjusted accordingly.

PROMOTION DEFERRED FOLLOWING ASSIGNMENT OF MEDICAL EMPLOYMENT LIMITATIONS

Board Findings and Recommendations

The grievor, a Captain, asserted that his previously announced promotion to the rank of Major in 2006 should not have been deferred just because he had been assigned Medical Employment Limitations (MEL). He argued that, once there was a decision to retain, the CF cannot deprive that member of employment opportunities on the basis of disability. Recognizing the application of the Universality of Service (U of S) principle to all CF members, the grievor argued that deferment of his promotion constituted discrimination on the basis of disability.

As redress, he requested that the deferral be lifted and that he receive back pay to his original promotion date.

Despite his deferred promotion, and following his grievance, the grievor was posted to a Major's position.

There was no Initial Authority (IA) decision because the grievor did not agree to extend the time in which the IA is required to render a decision.

The grievor was given materials related to his administrative review (AR)/MEL in November 2007. Though he provided representation, nothing was heard from personnel authorities until January 2009 when the grievor was advised that his case had been re-assessed and that he was being retained in the CF without career restrictions. In the intervening period, a new medical risk matrix for AR/MEL had been developed and the grievor was to benefit from that change in policy.

In 2009, the grievor was promoted to Major retroactive to January 2008.

The Board found that the CF authorities were correct to defer the promotion when they did. However, the Board also found that the grievor's effective date of promotion should be backdated to the original 2006 date because:

- There was no policy to specifically address the grievor's situation;
- A final decision was never reached in the original AR/MEL process and there was no evidence the grievor's submission was considered;
- The grievor had been serving in a Major's position since July 2006 without accompanying pay;
- There was a significant delay in providing AR/MEL materials to the grievor;
- The grievor's case was apparently put on hold for a considerable period while the new matrix was developed; and
- The grievor was not serving on 'retention', therefore the Director Military Careers Support Services guidelines did not apply.

The Board supported the grievor in his contention that there might be a legal argument regarding limits placed on a CF member's employment whose MEL breached the U of S principle but who had been retained. Although no specific recommendation was made on this point, the Board suggested that the CDS could take this opportunity to review CF promotion policies to ensure that they are in compliance with the *Canadian Human Rights Act*.

The Board recommended the grievance be upheld and the grievor's promotion be made effective on the original 2006 date.

Chief of the Defence Staff Decision

The Final Authority (FA) agreed with the Board's findings and recommendations to uphold the grievance.

In the FA's view, while the grievor's promotion to Major was deferred, his posting into a position calling for the rank of Major was not. By posting the grievor into the higher ranked position, an expectation of promotion was assumed.

The FA also determined that, given the grievor's permanent limitations, it was reasonable to expect that the AR/MEL would be completed in a timely fashion so that the grievor's promotion status would not linger unresolved.

The FA directed that Director General Military Careers (DGMC) promote the grievor to the rank of Major with an effective date in 2006, commensurate with his original promotion message.

Due to concerns on deferred promotion and posting members into positions of higher rank while awaiting results of an AR/MEL, the FA also asked that DGMC review this issue for potential systemic and discretionary effects and, if required, provide clear direction to ensure a consistent and legal approach.

INCENTIVE PAY CATEGORY ANNIVERSARY CHALLENGED

Board Findings and Recommendations

On 1 May 1998, the grievor was commissioned as a Pilot (untrained). He was considered a General Service Officer (GSO) for pay purposes until he attained Wings Standard on 18 January 2002. On that date, the grievor was also promoted to Captain with an effective date of 1 May 2001. He received retroactive pay as a Captain (basic) GSO between 1 May 2001 and 18 January 2002. On 18 January 2002, his pay was adjusted to that of Captain (basic) Pilot.

On 6 June 2006, the grievor was informed that an error had been made in assigning his Incentive Pay Category (IPC) anniversary date. It was explained that his IPC had been erroneously calculated starting on his promotion date as Captain as opposed to the date when he received his pilot wings. As result, the grievor received an incentive pay increase eight months earlier every year, leading to an overpayment of $12,746.37. Recovery was underway.

The grievor contested his IPC anniversary date. He claimed that his appropriate IPC anniversary date should have been the date he became a Captain, not the date he received his pilot wings. He also contended that delays in the training system had penalized him for a period of eight months, and that he should not be further penalized with a later IPC anniversary date.

The Initial Authority (IA) denied redress because the regulation governing incentive pay stipulated that once a member is qualified in his military occupation, he should be paid according to the appropriate pay table and be eligible for incentive pay.

The Board found that explicit financial regulations must be applied, determining that the grievor had satisfied the requirements for the next IPC level. The Board said the grievor had satisfied the required job performance standard after the effective date of his promotion, not just from the date of his Wings qualification.

Regarding the issue of training delay, the Board found the grievor's separate argument was fully and fairly considered by the IA. Prejudice caused to the grievor by delays in his pilot training had been reasonably rectified before the IPC issue arose.

The Board recommended that the Chief of the Defence Staff uphold the grievance.

Chief of the Defence Staff Decision

The CDS agreed with the Board's recommendation. In his decision, he indicated that the grievor's IPC anniversary date should not have been changed. *Compensation and Benefit Instruction* 204.015 does not provide a definition for the standard's criterion, nor any indication that the member must be occupation qualified. There was also no requirement to achieve a specific occupation qualification in a specific time. However, the CDS found that training delays had no bearing in determining when the grievor's 12-month period began for awarding incentive pay.

The CDS supported the Board's recommendation that pay records of other CF pilots whose IPC anniversary dates may have been determined in the same manner as the grievor should also be reviewed, and that any required adjustments be made to those dates. Since this issue was outside the realm of this redress of grievance, the CDS addressed it separately with the appropriate authorities.

RANK ADJUSTMENT AFFECTS REGULATIONS AND POLICY

Board Findings and Recommendations

A Sergeant (Sgt), on a five-year leave of absence from the Public Service (PS), was on a period of Class B Reserve Service (Cl B svc) due to end on 31 March 2008. In late 2007 he applied for an operational position on Task Force Afghanistan Rotation 1 of 2008 (TFA 1-08) on Class C (Cl C) svc. The position was advertised as a high/low rank of Sgt/Master Corporal (MCpl). He was the only applicant and was accepted at the rank of Sgt. As result of his acceptance, he did not reapply for the full-time

Cl B svc position he was then occupying, nor did he attempt to return to the PS.

Four days before he was due to depart for pre-deployment training, the Sgt was advised that the rank for the TFA 1-08 position had been reduced to a high/low of MCpl/MCpl. His PS position had been filled as had the Cl B position he previously occupied. As his Cl C svc had not yet been formally authorized, he went on pre-deployment training on Cl B svc at his substantive rank of Sgt. His Cl C was authorized 38 days later at the rank of MCpl, retroactive to his day of departure from his home unit. In filing a grievance, he explained that he only agreed to the terms of the down-ranked position to avoid foreclosure on his home mortgage due to a lack of income to meet payments.

As redress, the grievor requested his TFA 1-08 position be amended to the rank of Sgt or that he be given priority to fill another TFA 1-08 Sgt position.

The Initial Authority (IA) disagreed that the grievor had been demoted with a loss of salary and privileges and denied redress. The IA contended the grievor could have declined the position during the 42 days between notification of rank change and the Cl C svc authorization.

Prior to being referred to the Board, the grievance was reviewed by the Director General Canadian Forces Grievance Authority (DGCFGA). In a synopsis prepared by a member of the DGCFGA staff, the recommendation was to deny the redress because the grievor had 42 days between notification and the Cl C authorization to seek another position and, ultimately, chose to accept the MCpl position.

The Board did not dispute the facts or technical correctness of the IA and DGCFGA staff positions. However, the Board took the view that this case was not about a legal or policy question, it was about doing the right thing for this individual grievor.

The Board found that the notice of the position/rank change provided to the grievor was neither reasonable nor sufficient to allow the member to reconsider his employment with TFA 1-08; nor was it compatible with CF values.

The Board found that the grievor's circumstances met the requirements of Cl C svc employment policy to be over-ranked as a Sgt in the position he held on TFA 1-08.

The CDS could also direct that the grievor's TFA 1-08 position be over-ranked.

The Board noted that *Queen's Regulations and Orders for the Canadian Forces* 9.08 provides that Cl C svc on an operation includes travel to and the actual pre-deployment training. Further, Chief of Military Personnel Instruction 20/04 (Administration of Cl A, B and C svc) requires that Cl C svc not be commenced until after it is formally agreed to by the member, and an authority message issued. It also provides that Cl C svc is not to be authorized retroactively unless there has been an error. Yet, in this case, the grievor proceeded to the pre-deployment training on Cl B svc and the Cl C svc was authorized retroactively by 38 days. The Board found this problematic.

The compensation and benefit package provided differs for reservists on Cl B and Cl C svc. The largest differential is in the case of death where the reservist on Cl C svc participates in the Supplementary Death Benefit of 24 month's pay, non-taxable whereas the reservist on Cl B is covered by the Death Gratuity – Reserve Force at 20 month's pay, taxable. Although not quantified in this case, the Board considered that with the existing marginal tax rates, the spouse of a Cl B reservist would receive significantly less than their Cl C member counterpart.

Although this was a single case, the Board considered the issue serious enough to bring it to the attention of the CDS so he could ensure future Cl C svc for operations is properly administered and authorized in accordance with regulations and policy.

The Board recommended that the grievance be upheld and the CDS direct that the grievor be over-ranked in the TFA 1-08 position at his substantive rank of Sgt, effective the date he traveled to the location of his pre-deployment training for the duration of his Cl C svc.

Chief of the Defence Staff Decision

The Final Authority (FA) agreed with the Board's recommendation to uphold the grievance. He directed that the grievor's rank be changed for his Cl C employment for TFA 1-08 from MCpl to Sgt, including the pre-deployment period, that the Member Personnel Record Résumé be amended, and that his pay and benefits be recalculated to reflect these changes. The FA directed that the grievor be re-awarded his General Campaign Star to reflect the rank of Sgt.

Systemic Recommendations

IN REVIEWING INDIVIDUAL GRIEVANCES...

... the Canadian Forces Grievance Board sometimes finds that its recommendations with respect to a policy or a regulation may affect more than one member. In these cases, the Board makes the Chief of the Defence Staff aware that a broader problem may exist. The following are synopses of sample cases and the associated recommendations issued by the Board. The complete list can be found on the Board's website.

TOPIC	Circumstances Governed by More Than One Policy
Issue and Recommendation	The Board reviewed a case where a member was convicted of criminal charges arising from domestic violence and was subsequently imprisonned. The Board noted that two CF policies were applicable to the situation: Members involved in family violence, *Defence Administrative Order and Directive* (DAOD) 5044-4, and members incarcerated in civilian prisons, Canadian Forces Administrative Order (CFAO) 15-2 – Release. In this case, the Commanding Officer (CO) failed to submit a recommendation for retention or release as required by the CFAO. On the other hand, the DAOD vests considerable authority in the CO in dealing with a member involved in domestic violence. The Board was of the view that clear guidance was required, both to the chain of command and Department of National Defence Headquarters personnel authorities, where members are incarcerated after conviction of an offence related to family violence. ***The Board recommended to the CDS that he request clarification or policy amendment to provide clear guidance in cases including both family violence and civil imprisonment.***
Final Authority Decision	Pending
Outcome	Not yet available

TOPIC	Administration of *Foreign Service Premium* and *Operations Foreign Service Premium*
Issue and Recommendation	In July 2007, the grievor was posted outside Canada, accompanied by his dependants. At that time, he was receiving the Foreign Service premium (FSP) pursuant to the *Compensation and Benefits Instructions* (CBI). From May to September of 2008, the grievor was attach posted on an operational deployment, creating an entitlement to the operations (OPS) FSP, also pursuant to the CBI. During his operational deployment, the grievor's FSP amount was reduced pursuant to a Director Compensation and Benefits - Administration (DCBA) memo (1611-10.3.04 (0298/05) (DCBA 4) 23 August 2005). The Board was of the view that the provisions in the DCBA memo, regarding the calculation of FSP and OPS FSP, were inconsistent with the provisions of the CBI. In particular, contrary to article 10.14.02(14) of the *Military Foreign Service Instructions*, the DCBA memo purports to reduce the FSP amount by the member's share, and modifies the categories used in the CBI, instead of adjusting the FSP by the member's family size. Further, the DCBA memo adjusts the FSP payment effective the first day the member arrives at the operational post, rather than on the 26th compensation day of the absence. The Board was concerned that FSP and OPS FSP continued to be approved and reduced pursuant to the DCBA memo, despite the fact that these benefits are clearly governed by the CBI. Noting that the CBI were in the process of being amended to reflect the content of the DCBA memo, the Board indicated that it was not convinced that this proposed new scheme would result in the fair treatment of members with dependants, deployed while posted in foreign countries. The Board opined that the current provisions found in the CBI relating to FSP and OPS FSP appear perfectly fair and balanced. ***The Board recommended that the CDS order a review of the changes proposed to the FSP and OPS FSP by the DCBA to confirm if they are required. If ultimately it is decided that changes are required, the Board recommended that the CF work with the Treasury Board (TB) on an urgent basis in order to amend the applicable provisions, so as to regularize the administration of these allowances under proper TB authority.***
Final Authority Decision	Pending
Outcome	Not yet available

TOPIC	Administration of Separation Expense
Issue and Recommendation	The grievor was a divorced member with a Court approved 50/50 shared custody arrangement for his children when he was posted from Halifax to Ottawa on an imposed restriction (IR) and, therefore, granted separation expense (SE). Prior to authorizing the IR, the grievor's 50/50 shared-custody status had been discussed with the Director Military Careers (D Mil C) and both legal and Director Compensation and Benefits - Administration (DCBA) opinions had been sought. As a result, the D Mil C directed that, as long as the grievor could demonstrate the 50/50 shared custody arrangement, an IR could be authorized; it was. More than a year later, the DCBA explained that the grievor was not entitled to an IR or the SE because his children did not live with him full-time as set out in the DCBA 3 Aide-Memoire. The Initial Authority, the Director General Compensation and Benefits (DGCB) recognized that the term "normally resident" found in the *Compensation and Benefits Instructions* (CBI) 209.997 could be misinterpreted but that the DCBA 3 Aide-Memoire was clear that the grievor's children had to be resident with him on a full-time basis. The Board noted that the DCBA 3 Aide-Memoire explained that it modified the SE benefits based on Treasury Board (TB) approval in principle. The Board found that the full-time residency requirement of the DCBA Aide-Memoire went beyond amplifying the CBI and, in fact, placed limits on the benefits authorized by the TB; something that, in accordance with sections 12 and 13 of the *National Defence Act*, cannot be done without formal approval from the TB. The Board observed that, in addition to this grievance, there had recently been other grievances where the DCBA 3 Aide-Memoire had been used to place limits on benefits approved by the TB. ***The Board did not disagree with the DCBA intent to limit the SE to those members with full custody. However, the Board recommended that the CDS direct an in-depth policy review and make representation to TB with a view to clarifying SE to clearly address entitlements and eligibilities through appropriate regulations. The Board also recommended that the review address the situation of those members with shared custody arrangements.*** ***The Board recommended that the CDS ensure that clear direction is issued to DCBA and the IR approval authorities regarding the circumstances under which an IR and associated SE benefits may be approved.*** ***The Board recommended that the CDS direct that the practice of making changes to TB authorized regulations before formal approval should be discontinued.***
Final Authority Decision	Pending
Outcome	Not yet available

Financial Table

Planned Spending 2009-2010

(in dollars)

Salaries, wages and other personnel costs	2,842,583
Contribution to employee benefit plans	483,239
Subtotal	3,325,822
Other operating expenditures	2,031,112
Total planned expenditures	**5,356,934**

December 31, 2009. Actual expenditures will vary from the planned spending

Board Members and Staff

Chairperson

Bruno Hamel

Mr. Hamel was appointed Chairperson of the Board on March 2, 2009. A retired CF officer, he has a lengthy and varied experience in military complaint resolution after many years spent as a senior grievance analyst and, later, as Director Special Grievances Enquiries & Investigations within the Director General Canadian Forces Grievance Authority. He has also served as Director General of Operations in the Office of the Ombudsman for DND and the CF.

Full-time Vice-Chairperson

James Price

Mr. Price brings to his position extensive experience as a CF officer in all areas of military law, including the military justice system, administrative law, international law and operational law. After serving as Assistant Judge Advocate General for Europe, he was appointed military judge, presiding over cases involving both service offences and offences under the *Criminal Code of Canada*.

Part-time Vice-Chairperson

Denis Brazeau

Mr. Brazeau retired from the CF after 30 years of service, which included many deployments abroad and a position as Chief of Staff of the *Secteur du Québec de la Force terrestre*. He was appointed an Officer of the Order of Military Merit by the Governor General in 2004.

Part-time member

Carina Anne De Pellegrin

Ms. De Pellegrin is a legal professional, former CF aeronautical engineering officer and a graduate of the Royal Military College. She has also advised on human rights complaints before the Canadian and Ontario Human Rights Commissions.

Part-time member

Michael Auger

A retired artillery officer, Mr. Auger headed the Military Occupation Structure Review and served as Executive Assistant to the Assistant Deputy Minister of Human Resources – Military. He currently mentors junior officers at the CF Land Staff College.

Part-time member

Frederick Blair

A retired senior military lawyer, Mr. Blair was called to the Bar of Ontario in 1970. He later served in various positions within the office of the Judge Advocate General and deployed in Europe as Senior Legal Adviser.

With diverse backgrounds and a broad range of professional experience, the Board's employees work together to fulfill its mandate and achieve its vision.

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